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**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA**

CHASOM BROWN, WILLIAM BYATT,  
JEREMY DAVIS, CHRISTOPHER  
CASTILLO, and MONIQUE TRUJILLO  
individually and on behalf of all other similarly  
situated,

Plaintiffs,

v.

GOOGLE LLC,

Defendant.

Case No.: 4:20-cv-03664-YGR-SVK

**PLAINTIFFS' REPLY ISO MOTION TO  
CLARIFY THAT ALL STATUTES OF  
LIMITATIONS REMAIN TOLLED  
BASED ON THE COURT'S  
CERTIFICATION ORDER**

Judge: Hon. Yvonne Gonzalez Rogers  
Date: February 28, 2023  
Time: 2:00 p.m.  
Location: Courtroom 1 – 4th Floor

**I. INTRODUCTION**

This Court should clarify that all statutes of limitations remain tolled under *American Pipe* for all forms of relief. *See Am. Pipe & Const. Co. v. Utah*, 414 U.S. 538, 553 (1974). Confronted with a scenario like this one, where a class had been certified only under Rule 23(b)(2), the Fifth Circuit applied *American Pipe* to toll a class member’s lawsuit for damages. *See Taylor v. United Parcel Serv., Inc.*, 554 F.3d 510, 520-21 (5th Cir. 2008). To hold otherwise would “require individual plaintiffs to litigate their damages claims while [this] class action seeking injunctive relief . . . [is] pending,” which “run[s] completely counter to the efficiency rationale of the class action.” *Swierkowski v. Consolidated Rail Corp.*, 168 F. Supp. 2d 389, 395 (E.D. Pa. 2001). Google opposes this simple request for clarification, and yet Google did not identify a single case establishing that tolling does not or should not apply.

Tacitly acknowledging its weakness on the merits, Google asks the Court to avoid the issue altogether. Google claims that Plaintiffs are seeking an advisory opinion, and argues that any decision on tolling needs to wait. But “the Ninth Circuit has long countenanced prospective equitable tolling.” *Brown v. Davis*, 482 F. Supp. 3d 1049, 1056 (E.D. Cal. 2020). Courts have also rejected Google’s argument that prospective tolling is “tantamount to an advisory opinion.” *Hargrove v. Brigano*, 300 F.3d 717, 719 (6th Cir. 2002). Courts even have authority to prospectively declare tolling for “Fully Excluded Members” no longer before the court. *Chen-Oster v. Goldman, Sachs & Co.*, 2021 WL 5106528, at \*4 (S.D.N.Y. Nov. 3, 2021). This Court is on even firmer ground to clarify tolling because all class members remain before the Court as members of the certified class.

*American Pipe* tolling applies, and clarification is in everyone’s interest. Any uncertainty may encourage class members to file individual lawsuits now, creating additional burdens on class members, the Court, and Google. An order clarifying that all claims remain tolled can only help Google by avoiding unnecessary lawsuits, and it will of course benefit class members and the Court, which is already overseeing the same claims in this case.

## II. ARGUMENTS AND AUTHORITIES

### A. All Statutes of Limitations Remain Tolled Under *American Pipe*.

This Court’s certification of all claims under Rule 23(b)(2) means that all statutes of limitations remain tolled for all forms of relief. Under *American Pipe*, “commencement of a class action tolls the applicable statute of limitations for all members of the class ‘until class certification is denied.’” *Tosti v. City of Los Angeles*, 754 F.2d 1485, 1488 (9th Cir. 1985) (quoting *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 354 (1983)). Here, class certification was not denied; all seven claims were certified.

Google incorrectly asserts that Plaintiffs “fail to cite a single case” applying *American Pipe* to members of a Rule 23(b)(2) class who individually seek damages. Plaintiffs cited a Fifth Circuit case that did just that. Opp’n at 1; Mot. at 2 (citing *Taylor v. United Parcel Serv., Inc.*, 554 F.3d 510, 520-21 (5th Cir. 2008)). Like here, the district court in *Taylor* certified only under Rule 23(b)(2). See *Morgan v. United Parcel Serv. of Am., Inc.*, 169 F.R.D. 349, 358 (E.D. Mo. 1996) (underlying certification order addressed in *Taylor*). After the class’s claims were dismissed on summary judgment, the *Taylor* plaintiff filed a new case seeking damages, and the court held that his claims remained tolled through the pendency of the class’s appeal in the prior case. 554 F.3d at 520-21. That outcome was “consistent with the general rule that all members of a certified class enjoy the same rights as individually named plaintiffs in the suit.” *Id.* at 521.

Google buries the lede in a footnote, arguing that *Taylor* “is inapposite” because the court was only deciding if tolling ended with dismissal at summary judgment or after the appeal. Opp’n at 7 n.2. But if Google were correct that certification of a Rule 23(b)(2) class does not extend tolling for class members who individually seek damages, then *Taylor* could not have held that tolling remained in effect through the appeal in the prior case. Tolling for the *Taylor* plaintiff would have ended with the Rule 23(b)(2) certification order, even before summary judgment.

*Swierkowski v. Consolidated Rail Corp.*, 168 F. Supp. 2d 389, 395 (E.D. Pa. 2001) is another example of a court applying *American Pipe* to a member of a Rule 23(b)(2) class who later sought damages. Like here, certification had been denied under Rule 23(b)(3) but granted

1 under Rule 23(b)(2). The defendant argued that “the statute of limitations for plaintiff’s damages  
 2 claims began running . . . when the [] Court denied class certification as to any claims for  
 3 monetary damages.” *Id.* at 394. The court rejected that argument, holding that “the statute of  
 4 limitations was tolled for the damages claims during the pendency of the [Rule 23(b)(2)] class  
 5 [case].” *Id.* at 395.

6 Tellingly, Google failed to cite any case where a court reached the opposite conclusion.  
 7 Google implies that *Wit* is such a case, but Google mischaracterizes that decision. Opp’n at 8. In  
 8 *Wit*, the court decertified the class in part, entirely excluding some individuals and ruling that  
 9 others could not obtain damages. The court also prospectively tolled the statute of limitations for  
 10 120 days. *Wit v. United Behav. Health*, 2020 WL 6462401, at \*5 (N.D. Cal. Nov. 3, 2020).  
 11 Google argues that the tolling order “only makes sense” if the “class members whose damages  
 12 claims were decertified” were not already benefitting from the continuation of *American Pipe*  
 13 tolling. Opp’n at 8. Google omits that the tolling period was ordered to benefit “the **excluded**  
 14 **former** class members” who were removed from the class. *Wit*, 2020 WL 6462401, at \*5. *Wit*  
 15 does not support Google’s view that tolling for purposes of individuals seeking damages ends  
 16 with a full Rule 23(b)(2) certification.

17 It is not surprising that Google did not cite a single case adopting its view; Google’s  
 18 position violates the principles underlying *American Pipe*. Google advocates for “a rule which  
 19 would require individual plaintiffs to litigate their damages claims while [this] class action  
 20 seeking injunctive relief. . . [is] pending.” *Swierkowski*, 168 F. Supp. 2d at 395. That approach  
 21 “run[s] completely counter to the efficiency rationale of the class action by having two suits  
 22 covering essentially the same claim running at the same time.” *Id.* Tolling, by contrast, promotes  
 23 “efficiency and economy of litigation.” *American Pipe*, 414 U.S. at 553-54. Clarification offers  
 24 the certainty of individual legal claims being protected while a class action persists. The need to  
 25 distinguish between class treatment of some claims but not of others, and of what claims fall  
 26 under which category, is not a burden that should be placed on everyday class members whom  
 27 the class action device was designed to protect.

**B. This Court Can Clarify that all Statutes of Limitations Remain Tolled.**

Lacking legal support for its position, Google tries to lead this Court astray, by sidestepping the issue altogether. Google frames the relief sought as an unconstitutional advisory opinion and argues that clarification will need to wait until a class member files an individual action and Google raises the statute of limitations as a defense. Opp’n at 2-4. But courts have prospectively tolled limitations periods while rejecting Google’s argument that such relief amounts to an advisory opinion, and clarification here is akin to prospective tolling.

*Hargrove v. Brigano*, 300 F.3d 717 (6th Cir. 2002) is instructive. In dismissing a habeas petition for failure to exhaust appeals, the district court prospectively tolled the limitations period through 30 days following exhaustion. *Id.* at 717. The defendant argued that the court “exceeded its authority by *prospectively* ordering equitable tolling,” which it characterized as “tantamount to an advisory opinion.” *Id.* at 719 (emphasis in original). The Sixth Circuit rejected that argument and affirmed the order, relying on *Zarvela v. Artuz*, 254 F.3d 374, 376 (2d Cir. 2001), where “the Second Circuit was confronted with a factually similar situation” and “achieved the same result.” *Id.* at 720-21.

Prospective tolling is not limited to other Circuits. “[T]he Ninth Circuit has long countenanced prospective equitable tolling.” *Brown v. Davis*, 482 F. Supp. 3d 1049, 1056 (E.D. Cal. 2020) (citing *Calderon v. U.S. Dist. Ct. for the Cent. Dist. of Cal.*, 128 F.3d 1283, 1289 (9th Cir. 1997) (“*Beeler*”), *partially overruled on other grounds in Calderon v. U.S. Dist. Ct. for Cent. Dist. of California*, 163 F.3d 530 (9th Cir. 1998)). “[F]ederal district courts in California have relied upon . . . *Beeler* in granting prospective equitable tolling . . . .” *Davis*, 482 F. Supp. 3d at 1056 (citing *Tully v. Davis*, 2019 WL 1676080, at \*3 (N.D. Cal. April 17, 2019)).

While prospective tolling is most commonly encountered in the habeas context, nothing confines it so narrowly. In *Chen-Oster v. Goldman, Sachs & Co.*, 2021 WL 5106528, at \*1 (S.D.N.Y. Nov. 3, 2021), an employment discrimination case, after the court ordered some class members to arbitration and excluded them from the class, the plaintiffs moved for an order tolling the limitations period for those newly excluded individuals. The defendant opposed tolling by arguing (like Google) that “the Court does not have authority to grant tolling,” and that tolling

1 would need to be decided by the subsequent tribunal (there, the arbitrator). *Id.* at \*1, 3. The court  
2 rejected that argument, holding that it “has the requisite authority to toll the statute of limitations  
3 for Fully Excluded Members . . . to protect them from prejudice resulting from the alteration of  
4 their status.” *Id.* at \*4. This Court is on even firmer ground to address tolling because **all** class  
5 members remain before this Court.

6 Relatedly, Google does not meaningfully address Plaintiffs’ authorities where courts in  
7 this district “issued orders tolling statutes of limitations for individuals who (unlike here) are not  
8 even part of a certified class.” Mot. at 6 & n.1. Google claims those cases are different because  
9 the tolling periods were “brief[.]” Opp’n at 4. That misses the point: if this Court can toll claims  
10 for **former** class members, it can also clarify tolling for **actual** members of this Rule 23(b)(2)  
11 certified class. In Google’s own words, “all of Plaintiffs’ causes of action will still proceed on a  
12 classwide basis,” and Plaintiffs “will therefore have the opportunity to test each of their liability  
13 theories at summary judgment and, if viable, at trial.” Case No. 22-80147 (9th Cir.), Dkt. 3 at 4,  
14 8. Once Google concedes that the authority exists for brief periods, then the question becomes  
15 what is reasonable to achieve the bounds of equity, not a limitation born of Article III.

16 Google cites only two cases discussing advisory opinions, and those cases illustrate why  
17 that concern does not apply. Opp’n at 2-3. Unlike here, the plaintiffs in those cases asked the  
18 court to toll statutes of limitations before even filing an actual case. In *Jones v. Dallas*  
19 *Neurosurgical & Spine Associates*, 2013 WL 599766, at \*1 (D. Ariz. Feb. 14, 2013), the  
20 complaint did not “identify causes of action”; the plaintiffs sought “a declaratory judgment  
21 tolling the statute of limitations” on claims “which have not been identified.” *Id.*

22 *Martinez v. Warden*, 2021 WL 4078987, at \*1 (C.D. Cal. Sept. 8, 2021) supports  
23 Plaintiffs’ position. The petitioner in *Martinez* wrote a “letter requesting an extension of time for  
24 filing his federal habeas petition.” *Id.* The court ruled that it “lacks the jurisdiction to consider  
25 the motion before the petition is filed.” *Id.* But the court clarified that “if and when Petitioner  
26 files a habeas petition in this Court, this Court can consider whether . . . equitable tolling is  
27 warranted.” *Id.* at \*2 n.4. *Martinez* instructs that because Plaintiffs already filed their case, this  
28

1 Court can clarify tolling for members of the certified class, who are before the Court for all  
2 claims.

3 Finally, Google barely addresses Plaintiffs’ alternative argument that this Court can  
4 clarify tolling under its case-management authority, including Rule 42(b). Opp’n at 4; Mot. at 6.  
5 Google dismisses Wright & Miller as somehow “inapposite” without explaining why.  
6 Clarification here is in “the interest of efficient judicial administration.” Wright & Miller, 9A  
7 Fed. Prac. & Proc. § 2388 (3d ed.). This Court can exercise its “sweeping” case-management  
8 authority to clarify that all statutes of limitations remain tolled for all forms of relief, which is  
9 equivalent to declaring that class members’ claims first proceed to trial on their request for  
10 injunctive relief, and that any individual damages claims follow thereafter. *Id.* § 2389; *cf. Home*  
11 *Depot USA, Inc. v. Lafarge N. Am., Inc.*, 2023 WL 1458892, at \*8 (3d Cir. Feb. 2, 2023) (“A  
12 judge may formalize this process through the use of case management orders. This practice is  
13 regularly employed in MDLs—a judge may enter an order with respect to one party and then  
14 provide that it will be automatically extended to other parties if they do not come forward and  
15 show cause why it should not be applicable.”). By contrast, refusing clarification invites  
16 “needless” individual lawsuits, which is “precisely the situation that . . . the tolling rule of  
17 *American Pipe* w[as] designed to avoid.” *Crown, Cork*, 462 U.S. at 351.

### 18 **C. Clarification Will Not Prejudice Google.**

19 Clarification is in the best interest of all parties, as well as in this Court’s best interest.  
20 Mot. at 1, 7. There is no reason to encourage any of the “tens of millions” of class members to  
21 file new lawsuits when the same claims are already moving toward resolution. Oct. 11 Hearing  
22 Tr. 14:11-20. Google’s assertion that individual cases are “not realistic” only reinforces the lack  
23 of prejudice. If so, no individuals will file cases regardless of clarification. Opp’n at 5.

24 But given the sheer size of this certified class, the prospect of individual cases should not  
25 be discounted. If just 0.1% of class members filed, there would be tens of thousands of lawsuits.  
26 Mot. at 3. Plaintiffs are not contradicting what they said in their class certification motion. Opp’n  
27 at 5. Plaintiffs stand by their argument that “a class action is superior because it is more efficient  
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for the strained courts and most individuals lack the resources to prosecute.” Dkt. 609 at 23. That argument is not inconsistent with some class members pursuing individual lawsuits for damages, particularly with large statutory penalties in play. Mot. at 2-3. Furthermore, if clarification is denied, Class Counsel in accordance with their fiduciary duties may be compelled to ask the Court to direct that notice be provided. *See* Fed. R. Civ. P. 23(c)(2)(A). Individuals may very well come forward.

Google’s feigned concern about how “memories fade [] and evidence grows stale” (Opp’n at 6) should be disregarded because Google’s misconduct is ongoing, and Google remains subject to a preservation order. Memories cannot fade when the conduct is continuing, and the party is preserving evidence of that conduct. It is odd to hear this claim in a case challenging Google’s collection and storage of information, and nothing Google offers supports the odd claim that the law favors just forgetting about past harms. *Sartor v. County of Riverside*, 2022 WL 18278597, at \*4 (C.D. Cal. Nov. 30, 2022) is inapposite. That case involved a motion to stay a lawsuit about “an officer-involved shooting.” *Id.* The court denied the stay because the case turned on “the testimony of [a] small number of eyewitnesses” whose “memories will surely fade somewhat.” *Id.* Here, by contrast, Google continues collecting, storing, and monetizing private browsing data, making the evidence anything but “stale.” The documents, information, and data Google must preserve for the upcoming trial on behalf of the certified class will be relevant to any individuals from the class who file suit. There is no prejudice to Google.

### III. CONCLUSION

Plaintiffs respectfully request that this Court enter an order clarifying that, based on the class certification order, any statutes of limitations remain tolled for all claims and for all relief sought for the duration of this case, including any appeals.

Dated: February 8, 2023

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